

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

|                           |   |                             |
|---------------------------|---|-----------------------------|
| James H. Street,          | : |                             |
|                           | : | Civil Case No. 2:12-cv-0203 |
| Petitioner                | : | Criminal No. 2:07-cr-0082   |
| v.                        | : | Judge Watson                |
| United States of America, | : | Magistrate Judge Abel       |
| Respondent                | : |                             |

### **Report and Recommendation**

Petitioner James H. Street, a prisoner at FCI Elkton, brings this action for writ of habeas corpus under 28 U.S.C. §2255. This matter is before the Magistrate Judge for preliminary consideration under Rule 4, Rules Governing Section 2255 Cases in United States District Courts.

The petition alleges that on May 6, 2008, petitioner Street was convicted in the United States District Court for the for the Southern District of Ohio of mail fraud and making a false statement to law enforcement. He was sentenced to a term of 41 months imprisonment and 3 years supervised release.

Petitioner filed a notice of appeal from the judgment of conviction. The Court of Appeals summarized the issues raised as follows:

Mr. Street presents six issues on appeal. He contends (1) that his counsel was ineffective; (2) that there is insufficient evidence to support his convictions for mail fraud and making a false statement; (3) that the district court erred in denying his motion for a mistrial related to juror misconduct; (4) that the district

court erred in applying certain sentencing enhancements to him; (5) that the district court committed plain error when it failed to declare a mistrial because the jury did not timely receive all of the exhibits; and (6) that the district court erred in including certain activities in his relevant conduct for purposes of sentencing.

November 12, 2010 Decision, Doc. 100, PAGEID # 1749. On November 12, 2010 the United States Court of Appeals for the Sixth Circuit issued a decision affirming the judgment of conviction. Subsequently, the United States Supreme Court denied Street's petition for a writ of *certioari*.

The petitioner pleads the following grounds for relief:

- A. Conviction is in violation of Honest Services Fraud Law under ruling of US Supreme Court and is Unconstitutionally Vague.
- B. Insufficient Evidence exists to support conviction/sentence for Mail Fraud and Making False Statements.
- C. Ineffective Assistance of Counsel.
- D. Unlawful Enhancement for "7 checks" where enhancement was not based on reliable evidence under U.S.S.G. 6A1.3.

Doc. 104, PAGEID ## 1778-79.

Claims that were or could have been raised on direct appeal may not be raised in a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. *Regalado v. United States*, 334 F.3d 520, 528 (6th Cir. 2003). Street presented all the claim raised here to the Court of Appeals. That Court held that all of the claims--except the claim of ineffective assistance of counsel--lacked merit. The Court of Appeals held that the claim of ineffective assistance of counsel could be raised in a motion to vacate sentence under § 2255.

Accordingly, the Magistrate Judge RECOMMENDS that all the claims, except the ineffective assistance of counsel claim, be DISMISSED because they were presented to the Court of Appeals on direct appeal. **Respondent is ORDERED** to answer the motion to vacate sentence under § 2255 within **twenty-one (21) days of the date of this Order**.

If any party objects to this Report and Recommendation, that party may, within ten (10) days, file and serve on all parties a motion for reconsideration by the Court, specifically designating this Report and Recommendation, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1)(B); Rule 72(b), Fed. R. Civ. P.

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to *de novo* review by the District Judge and waiver of the right to appeal the judgment of the District Court. *Thomas v. Arn*, 474 U.S. 140, 150-52 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also, Small v. Secretary of Health and Human Services*, 892 F.2d 15, 16 (2d Cir. 1989).

s/Mark R. Abel  
United States Magistrate Judge